Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

ROBERT BURNS SPRINGSTEEN, IV,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Framers of the United States Constitution intend that an accused ~~person's right~~ "to be confronted with the witnesses **against** him" prohibit the admission of solely self-incriminating statements by an out-of-court declarant that made no allusions to the existence of another party?

2. Did the Court of Criminal Appeals err when it failed to consider what the "damaging potential" of cross-examination would have yielded, an inquiry which should have been the first step of a harm analysis under *Delaware v. Van Arsdall,* 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986)?

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CONSTITUTIONAL PROVISIONS

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PETITION FOR A WRIT OF CERTIORARI

The State of Texas respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The unpublished decision of the Texas Court of Criminal Appeals, *Robert Burns Springsteen, IV, v. State*, No. AP-74,223 (filed May 24, 2006) (avail. 2006 Tex. Crim. App. LEXIS 2340), including the majority opinion and the dissenting opinion of Keller, J., is reproduced at App. A, *infra*. The unpublished notice of the Texas Court of Criminal Appeals denying State's Motion for Rehearing, *In re Springsteen*, No. AP-74,223 (filed September 27, 2006) (avail. 2006 Tex. Crim. App. LEXIS 1881), is reproduced at App. B, *infra*.

JURISDICTION

The Texas Court of Criminal Appeals issued an opinion on May 24, 2006 reversing Respondent's conviction for capital murder. *Robert Burns Springsteen, IV, v. State*, No. AP-74,223, 2006 Tex. Crim. App. LEXIS 2340 (filed May 24, 2006). The Court of Criminal Appeals denied the State's Motion for Rehearing on September 27, 2006. *In re Springsteen*, No. AP-74,223 (filed September 27, 2006). Jurisdiction of this Court is properly invoked pursuant to 28 USCS § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution, in pertinent part, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

A Travis County Grand Jury indicted Respondent for the capital murder of thirteen-year-old Amy Ayers. (CR I 4). Amy Ayers was one of four teenaged girls who were brutally murdered on December 6, 1991. The girls were stripped naked, bound and gagged, and some of the girls were sexually assaulted. All were shot execution style in the back of an "I Can't Believe It's Yogurt" shop in Austin, Texas. The bodies and the place of business were then set on fire. The indictment alleged that Respondent intentionally caused the death of Amy Ayers by shooting her with a firearm, a deadly weapon, or strangling her with a ligature, a deadly weapon, in the course of committing or attempting to commit robbery and/or burglary. (CR I 4; CR III 453).

At trial in 2001, the State introduced the redacted statement of Respondent's codefendant and roommate, Michael Scott. Austin Police Detective Robert Merrill interviewed Michael Scott on September 9, 10, 12 and 14, 1999.[1] On September 14, 1999, Austin Homicide Detective Manuel Fuentes met with Michael Scott outside a Grandy's Restaurant at 8:43 a.m. so that Scott could memorialize his statements in writing. (RR 53: 159-160). Fuentes did not have a warrant for Scott's arrest, and Scott was not handcuffed, arrested, or placed in custody. (RR 53: 161). Scott voluntarily accompanied Fuentes to his office to give a written statement. (RR 53: 161-162). Fuentes read Scott his Miranda rights, which Scott understood and waived. (RR 53: 163). Fuentes did not threaten Scott or promise him anything in exchange for his statement. (R 53: 163). During the course of his statement, Scott was free to leave the interview room on his own, go outside, and smoke cigarettes. (RR 53: 164).

After Scott completed his statement, Fuentes read it to him and allowed him to make corrections. Scott initialed each

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[1] Excerpts from these recorded interviews are attached at App. C.

page of his statement and signed the document in the presence of civilian witnesses. (RR 53: 165-166). After Scott gave his statement, Fuentes drove him back to his car. Scott was arrested weeks later. (RR 53: 177).[2]

Defense counsel filed a brief with the trial court arguing, in part, that the admission of Scott's statement would violate the Confrontation Clause of the Sixth Amendment. (CR III 394-403, 405-421). The trial court redacted the statement to make it exclusively self-inculpatory, and ultimately overruled Respondent's objections. (RR 53: 132-144). Scott's full written statement was admitted for the record only as SX 379. (RR 53: 166). All references to Respondent were redacted from Scott's statement, and this redacted version of SX 379 was also admitted for the record only as SX 377. (RR 53: 167). Detective Fuentes then read the redacted statement (SX 377) to the jury. The court reporter made a written transcription of the statement as read by Fuentes and that transcription was admitted into evidence before the jury. (RR 53: 175).[3] The State and the defense agreed that Scott would invoke his Fifth Amendment right if called to testify in this case. (RR 53: 203).

In the redacted statement, Scott said that he served as a lookout at the front of the yogurt shop during the robbery. (RR 53: 171). At one point he went to the back of the store and saw that all of the girls were naked. He tied them up using their bras and clothing. (RR 53: 171). He attempted to rape one of the girls. (RR 53: 172). He admitted shooting two of the girls. (RR 53: 172). After the girls were dead, he stacked one girl on top of another. (RR 53: 172). He gathered napkins, cups, paper towels, and piled them on top of the three girls. (RR 53: 172). He emptied a can of Zippo lighter fluid on them and set them afire with a Zippo lighter. He

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[2] Michael Scott's full written confession is attached at App. E.

[3] This transcription of Scott's redacted statement is attached at App. D.

remembered the "whoosh" sound when the accelerant caught fire. (RR 53: 172). After the murders, Scott drove to a bridge and threw up over the side of the bridge. (RR 53: 173). He also threw a knife from the yogurt shop over the bridge. (RR 53: 173). He described two guns that were used in the murders. (RR 53: 173). He said he had also confessed his involvement in these murders to his father and to his best friend, Patrick Davidson. (RR 53: 169).

The State presented extensive other evidence at trial, including Respondent's own videotaped, voluntary, non-custodial statement confessing his involvement in the yogurt shop murders. (RR 49: 103; SX 296, 297, 298). Respondent's videotaped statement was played for the jury and Detective Merrill reviewed the statement with the jury. (RR 50: 11-15). Respondent gave a lengthy rendition of what he did on December 6, 1991. He initially denied involvement in the murders, but finally admitted being near the yogurt shop, then being in it, and then participating in the murders. (RR 49: 138). Respondent admitted entering the yogurt shop earlier that evening along with Scott and two others. He said that he and Scott surreptitiously made their way to the back door, and that he put either a rock or a folded cigarette pack in the door so that, while it appeared to be locked, it actually could be opened from the outside. (RR 49: 139).

Respondent told police that two weapons were used in this offense: a .22 revolver and a silver .380 semiautomatic. (RR 49: 138-139). The information regarding the weapons was significant, as it matched the evidence from the crime scene. (RR 49: 139-140). Respondent admitted that he shot one victim with the .380; the criminal investigation revealed that Amy Ayers was shot with a .380. (RR 49: 140). He illustrated with his arms and body the position of Amy's body at the time he shot her. (RR 49: 141). Amy's burned body was found just as described. Respondent also admitted in graphic

terms that he had sex with one victim, but did not ejaculate. (RR 49: 140).

The jury returned a general verdict of guilty of capital murder. (CR III 459). Based upon the jury's answers to the three punishment issues submitted, the trial judge sentenced Respondent to death. (CR III 465-467; RR 61: 12).[4]

In his brief on direct appeal to the Texas Court of Criminal Appeals, filed on October 18, 2002, Respondent alleged, among other claims, that the admission of the redacted excerpts of Scott's written confession violated the Confrontation Clause. The State responded in its brief, filed on April 15, 2003, that Scott's statement was wholly self-inculpatory, fell within a firmly rooted hearsay exception (statement against penal interest), and bore particularized guarantees of trustworthiness.

On March 8, 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The next day, Respondent filed a supplemental letter brief alerting the Court of Criminal Appeals to this Court's holding in *Crawford*. Respondent argued that, because Michael Scott's statement was given in response to police interrogation, it was "testimonial" under *Crawford, supra,* and therefore violated the Confrontation Clause. The State responded in a letter brief filed on April 2, 2004, that *Crawford v. Washington* was distinguishable. The State noted that *Crawford* involved an out-of-court statement that was clearly accusatory of the defendant and given as a result of custodial interrogation, whereas the redacted version of Scott's statement admitted at trial was solely self-incriminating and qualified as a statement against penal interest. Thus, Scott was not a "witness against" the respondent as contemplated

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[4] Texas Governor Rick Perry commuted Respondent's sentence to life imprisonment after this Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

by the Sixth Amendment. In addition, the State argued that, unlike the declarant in *Crawford*, Scott was not in custody at the time he made his statement to the police.

The State followed up on September 9, 2004, with a post-submission brief addressing *Crawford v. Washington* and harmless error. The State argued that the trial court's admission of Scott's redacted statements did not implicate a "core concern" of the Confrontation Clause because his statements did not accuse the respondent of criminal activities. The State also argued that the respondent was not harmed by any error arising from the admission of Scott's statements. The State emphasized its compelling evidence at trial, including the respondent's own confession.

On October 4, 2004, the State filed a supplemental post-submission brief further developing its harmless error argument. In particular, the State argued in this brief that the failure to allow cross-examination of Michael Scott was not harmful because Scott's live testimony—and the resulting impeachment—would have been more detrimental to Respondent than was the redacted confession. The State provided excerpts from Scott's recorded interviews to show the compelling material with which Scott would have been impeached via cross-examination.

On May 24, 2006, the Court of Criminal Appeals issued its opinion reversing Respondent's conviction. *Springsteen v. State*, No. AP-74,223, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App., decided May 24, 2006) (not designated for publication). The court held that, because Scott's statement was taken by police officers in the course of an interrogation, it was testimonial. After finding a Confrontation Clause violation, the court held that it could not say, beyond a reasonable doubt, that the admission of Scott's statements did not affect the jury's determination of Respondent's guilt. *Id.*

On June 9, 2006, the State filed a motion for rehearing contending that the Court of Criminal Appeals had errone-

ously omitted the first prong of the harmless error analysis prescribed by this Court for Confrontation Clause errors. See *Delaware v. Van Arsdall*, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986) ("assuming that the damaging potential of the cross-examination were fully realized"). Further, the State again argued that Scott's statement should not be considered "testimonial" under *Crawford* because it did not accuse Respondent of any misconduct.

On September 27, 2006, the Court of Criminal Appeals denied the State's motion for rehearing. Mandate issued on October 12, 2006.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENTS

1. The Framers of the United States Constitution intended that an accused person's right "to be confronted with the witnesses **against** him" was meant to ensure that he would be able to challenge *accusatory* statements introduced against him. Therefore, the Texas Court of Criminal Appeals erred in finding fault in the admission of solely self-incriminating statements by an out-of-court declarant that did not mention the accused or even refer to the existence of another party. Such statements should not be prohibited as "testimonial" under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). This is an important question of federal law that has not been, but should be, settled by this Court.

2. The Texas Court of Criminal Appeals erred when it failed to consider what the "damaging potential" of cross-examination would have yielded, an inquiry that should have been the first step of that court's harm analysis under *Delaware v. Van Arsdall,* 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986). Thus, the Court of Criminal Appeals has decided an important federal question in a way that conflicts with a relevant decision of this Court.

I. PROHIBITED STATEMENTS SHOULD BE ACCUSATORY

According to the Sixth Amendment, "in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." In rejecting the *Ohio v. Roberts*[5] test, the Court re-examined the history behind the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354, 1359-1363 (2004). First, the Court concluded that the Framers were concerned with the use of ex parte examinations as evidence against criminal defendants, so the Court rejected any notion that the Confrontation Clause is only applicable to in-court testimony. *Id,* at 1364. Rather, the Court stated that such an interpretation would leave the Clause "powerless to prevent even the most flagrant inquisitorial practices." On the other hand, not all hearsay implicates the "core concerns" of the Confrontation Clause. *Ibid.* The Court settled on the view that the core concern of the Confrontation Clause is to guard against use of "testimonial" evidence without the opportunity for cross-examination:

> Various formulations of this core class of testimonial statements exist: "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.

Id. at 1364.

Satisfied that parameters could be developed subsequently, the Court stated that:

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else

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[5] *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

> the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Id., at 1374.

Subsequently, in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court offered more guidance concerning when "'statements taken by police officers in the course of interrogations'" qualified as "'testimonial' statements." *Id.* (quoting *Crawford*, 541 U.S. at 52). The Court ruled that, concerning excited statements made to law enforcement officers, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* (emphasis added). The Court ruled that statements to a 911 operator (acting as a law enforcement agent) describing an ongoing domestic disturbance and identifying the assailant were nontestimonial because the statements were made "to describe current circumstances requiring police assistance." *Id.* at , 126 S. Ct. at 2276-77. However, statements describing events that already had ended were testimonial because the "interrogation was part of an investigation into possibly criminal past conduct . . . ." *Id*, 126 S. Ct. at 2278-79.

The instant case presents an appropriate set of circumstances to further refine the definition of "testimonial" and to consider the boundaries of "interrogation." It is evident that the State's use of Michael Scott's redacted confession presents a fundamentally different issue than that addressed in *Crawford* or *Davis/Hammon*. Unlike the present case, the statements in *Crawford* and *Davis/Hammon* accused the perpetrator of misconduct.

From this undisputed fact comes Petitioner's primary position: Hearsay statements that are "testimonial" under *Crawford* must necessarily be *accusatory* of the defendant.

Various forms of the root word "accuse" appear in the majority opinion in *Crawford* twenty-seven times. While it is true that the Court did not explicitly delineate as "testimonial" only those portions of statements that are accusatory in nature, it is difficult, if not impossible, to read the opinion without realizing that the Court was preoccupied with the evils of trial by ex parte accusations.

This Court in *Crawford* cited five prior Supreme Court cases in which it prohibited the use of accomplices' statements where the defendant had no opportunity to cross-examine the accomplice. *Id*, at 1367-68, citing *Roberts v. Russell*, 392 U.S. 293, 293, 88 S. Ct. 1921, 20 L.Ed.2d 1100 (1968); *Bruton v. United States*, 391 U.S. 123, 124, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968); *Lee v. Illinois*, 476 U.S. 530, 536-37, 106 S. Ct. 2056, 90 L.Ed.2d 514 (1986); *Douglas v. Alabama*, 380 U.S. 415, 416-17. 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965); *Lilly v. Virginia*, 527 U.S. 116, 121-22, 119 S. Ct. 1887, 144 L.Ed.2d 117 (1999). In the first three cases accomplices' accusatory statements were introduced against the defendants at joint trials, and in the last two cases such statements were introduced during the defendants' separate trials. In *Lilly* the trial court admitted in their entirety two accomplice statements accusing the defendant of masterminding robberies and murdering the victim.

The *Crawford* Court's assumption that such statements would be accusatory is the backbone of the analysis. Petitioner believes that the Court's articulation of the basic tenets of "testimonial" necessarily assumes that such declarants would be describing facts that accuse the defendant of criminal activity. The *Davis/Hammon* Court subsequently noted that:

> When we said in *Crawford*, supra, at 53, 124 S. Ct. 1354, 158 L. Ed. 2d 177, that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely di-

> rected at establishing the facts of a past crime, *in order to identify (or provide evidence to convict) the perpetrator*. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.

Id, 126 S. Ct. at 2276 (emphasis added).

This assumption of accusation is consistent with the "core concern" of the Confrontation Clause: to prohibit trial by ex parte affidavit or statement. See *Crawford*, 124 S. Ct. 1363-1365. The *Crawford* holding applies to situations in which the Confrontation Clause has been triggered. *Inherently, statements do not trigger the Clause unless they accuse the defendant of some wrongdoing.* "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id*, at 1364 (emphasis added). As this Court noted, Sir Walter Raleigh insisted, in vain, that he be permitted to confront the man accusing him of treason: "(L)et him speak it. Call my accuser before my face." *Id*, at 1360. Without question, this accusatory characteristic underlay the *Crawford* Court's analysis, and has continued as the lynchpin in *Davis* and *Hammon*. The precise issue now before the Court is whether this new paradigm acknowledges that specific, solely self-incriminating assertions made within a broader statement should not be viewed as "testimonial" since, at the moment of formulation, they were not "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 126 S. Ct. at 2276.

Other courts and commentators have held that to implicate Confrontation Clause concerns, the statements at issue must be accusatory in some fashion. See *Green v. DeMarco*:

> Moreover, the focus of the required inquiry under *Crawford* is upon the historical foundation of the Confrontation Clause, 124 S. Ct. at 1363, and the evi-

> dence at issue here bears little resemblance to the evidence that has triggered confrontation problems in the past. First, neither document in question accuses anyone of conduct that is criminal. They are neutral in character, relating only to the operation of the breath test instrument and the reference solution used to calibrate it. The ex parte statement at issue in *Crawford* was inculpatory in that it refuted the defendant's claim of self-defense. . . . So too was the hearsay evidence in the *Raleigh* case as it involved an accusation of treason. Commentators have suggested that confrontation concerns historically have been triggered by accusatory statements. . . . Indeed, the Second Circuit has said that: "The Confrontation Clause targets only that testimony that contains accusations against the defendant." *Ryan v. Miller*, 303 F.3d 231, 247 (2d Cir. 2002).[6]

No. 2005/09951, 2005 NY Slip Op 25528, 13-14, 812 N.Y.S.2d 772, 2005 N.Y. Misc. LEXIS 2776 (N.Y. Sup. Ct. Dec. 12, 2005) (most citations omitted).

The proposed text leading up to the Confrontation Clause also suggests that the Framers intended to proscribe the out-of-court statements of *accusers*, rather than all out-of-court statements. In particular, the proposed amendments to the Constitution that James Madison introduced in the First Congress would have guaranteed an accused the right "to be confronted with his accusers, and the witnesses against him." Mosteller, Robert P., Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions, 1993 U. Ill. L. Rev. 691, 747-755, n. 277. And the Virginia Bill of Rights guaranteed the right "to be con-

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[6] Compare also *Bohsancurt v. Eisenberg*, 129 P.3d 471, 477 (Ariz. Ct. App. 2006), holding that breathalyzer machine calibration records are business records not barred by the Confrontation Clause. The Arizona court noted that other courts have permitted the admission of similar records, without testimony from their preparer, by concluding that the evidence set forth in the records is not "against" any defendant.

fronted with the accusers and witnesses." *Id.* The reference to accusers was perhaps dropped from the final version in the Federal Constitution because, with the addition of the term "against him," it was seen as redundant. *Id.*

In fact, this Court long ago suggested that the Confrontation Clause does not proscribe the admission of evidence that does not involve some inquiry into the guilt or innocence of the accused. In *Dowdell v. United States*, holding that the defendants' Confrontation Clause rights were not violated when court personnel supplemented the record, this Court observed that the officials:

> (W)ere not witnesses against the accused within the meaning of this provision of the statute. *They were not asked to testify to facts concerning their guilt or innocence*,—they were simply required to certify . . . as to certain facts regarding the course of trial(.)

Dowdell v. United States, 221 U.S. 325, 332-331, 31 S. Ct. 590, 55 L. Ed. 753 (1911) (emphasis added).

This Court's formulation of the meaning of "testimonial" in *Crawford* and *Davis/Hammon* is not inconsistent with the notion that the Confrontation Clause applies only to portions of statements that are accusatory concerning the defendant. Petitioner suggests that a reviewing court must simply make an initial inquiry as to whether the challenged evidence is accusatory in any manner. "Accusatory," like "interrogation," would be given its common and ordinary meaning. One commentator has suggested that accusatory statements are statements that are accusations, viewed at the time they were made, of conduct that is criminal. Mosteller, Robert P., "Testimonial" and the Formalistic Definition - The Case for an "Accusatorial" Fix, 20 Crim. Just. R. 14 (2005). Statements obtained via police interrogation would then be inadmissible under *Crawford* where the witness is not made

available for cross-examination, to the extent that they include any remarks accusing the defendant of misconduct.[7]

In practice, then, the interpretation proposed by Petitioner would have narrow applicability. In order to show that statements obtained as a result of police interrogation did not implicate the Confrontation Clause, the prosecution would need to show that all direct and indirect references to a defendant had been removed. The remaining comments would be non-accusatory because, when the declarant made these particular self-incriminating remarks, he was not accusing the defendant of any illegal conduct. For example, Scott's redacted statement consisted of assertions such as "I pointed the gun at her and tried to shoot at first but couldn't. I pointed the gun again at the girl and fired once into her head." (App. D).

The non-accusatory portions would not be prohibited by the Confrontation Clause, though they might be inadmissible under some other rule or provision. As to any accusatory portions of the declarant's statement, the trial or appellate court would then analyze whether they were "testimonial" under *Crawford*, *Davis/Hammon*, and their progeny.

Davis explicitly recognized the utility of removing assertions made with an awareness that they provide evidence to convict another party:

> Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658-659, 104 S. Ct. 2626, 81 L.

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[7] See *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002) ("Testimony need not contain an explicit accusation in order to be excluded as a violation of the Confrontation Clause. 'To implicate the defendant's confrontation right, the statement need not have accused the defendant explicitly but may contain an accusation that is only implicit.'")

> Ed. 2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

Davis, 126 S. Ct. at 2277.[8]

In the present case, while Michael Scott's redacted statement (App. D) may at first glance seem to qualify as "testimonial" because it was derived from police questioning, Scott was not being a "witness( ) against" Respondent when he was making solely self-inculpatory remarks. The redacted statement read into evidence is completely non-accusatory and does not remotely refer to Respondent or any other actor. (RR 51: 49-50). For this reason the statement could even be viewed as exculpatory because the account makes Scott appear to be the sole actor in the murders. It is true that, by corroborating what Respondent told investigators, the statement indirectly supported the prosecution. It seems to Petitioner, though, that this purely corroborative characteristic of Scott's redacted statements is far removed from the "core concern" of the Sixth Amendment; the statements accused Respondent of nothing. They may have been evidentiary, in the sense that fingerprints would have been evidentiary, but they were not accusatory.

Petitioner contends that this function of Scott's statement simply cannot be a core concern of the Confrontation Clause. Again, the core concern of the Confrontation Clause is to

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[8] Additionally, this practice of redacting the statement to eliminate accusatory remarks will be familiar to prosecutors and courts, as this was often necessary under pre-*Crawford* jurisprudence. See *Richardson v. Marsh*, 481 U.S. 200, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987) (this Court held that use of a codefendant's hearsay confession does not violate the confrontation clause where a proper limiting instruction is given and the confession is redacted to eliminate any reference to his or her existence).

protect a criminal defendant from the statements of unavailable declarants who accuse the defendant of something. Because Scott's redacted confession contained no accusatory statements, express or implied, against Respondent, the Confrontation Clause was not triggered by its admission into evidence.

In sum, Petitioner asks this Court to address whether the Framer's intention in writing the Confrontation Clause was to allow a defendant to confront his *accusers,* and whether the Framers would have considered solely self-incriminating assertions made in a conversation or document to be *accusatory* of a defendant. Petitioner suggests that the Framers would not have sought to bar admission of wholly self-incriminating statements that neither reference the defendant nor even mention the existence of an accomplice.

II. VAN ARSDALL HARM ANALYSIS NOT FOLLOWED

A. The *Van Arsdall* Harm Analysis

In *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969), this Court expressly rejected the claim that the admission into evidence of a statement made by a non-testifying codefendant "can never be harmless." *Delaware v. Van Arsdall*, 475 U.S. 673, 682, 89 L. Ed. 2d 674, 685, 106 S. Ct. 1431, 1437 (1986), citing *Harrington*, 395 U.S. at 254. In *Van Arsdall*, this Court confirmed that "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *Van Arsdall*, 475 U.S. at 682-684.

The Court established a three-prong analysis for reviewing courts to follow in assessing the harm from the denial of an opportunity to cross-examine an adverse witness. *Id*, 475 U.S. at 684. First, the reviewing court assumes that the damaging potential of the cross-examination were fully

realized. *Id.* Second, with that assumption in mind, the court reviews the error in connection with the following factors:

> 1) The importance of the witness' testimony in the prosecution's case;
>
> 2) Whether the testimony was cumulative;
>
> 3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
>
> 4) The extent of cross-examination otherwise permitted; and,
>
> 5) The overall strength of the prosecution's case.

Id. Finally, in light of the first two prongs, the court determines if the error was harmless beyond a reasonable doubt. *Id*; see also *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L. Ed. 2d 705 (1967); TEX. R APP. P. 44.2(a).

Significantly, the *Van Arsdall* Court cited *Harrington* and *Schneble v. Florida*, 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056 (1972), for the purpose of illustrating the distinct analysis necessary for this type of error. This suggests that the Court was attempting to bring a distinctive organization and structure to Confrontation Clause harm analysis.

In the instant case, the Court of Criminal Appeals ostensibly followed *Van Arsdall* when assessing harm for the erroneous admission of Michael Scott's redacted statement. See *Springsteen v. State*, No. AP-74,223, 2006 Tex. Crim. App. LEXIS 2340, slip op. at n. 19, n. 21 (Tex. Crim. App., decided May 24, 2006) (not designated for publication). The court set out the five factors from the second prong of *Van Arsdall*, yet completely skipped the first step of the analysis. In other words, the court did not make any attempt to "assume that the damaging potential of the cross-examination were fully realized," and did not even mention the existence of this first step of the analysis, despite the court's adoption of the

Van Arsdall procedure for Confrontation Clause violations in 1991.[9] *Id*, slip op. at *14-*25.

The Court of Criminal Appeals did not discuss or explain its choice not to follow the first step prescribed by *Van Arsdall*. However, the court's internal reasoning is apparent upon reading a subsequent decision regarding a similar retroactive application of *Crawford v. Washington*. See *Davis v. State*, No. PD-1309-05, 2006 Tex. Crim. App. LEXIS 1978 (Tex. Crim. App. 2006).

In *Davis*, the court explained why it now refuses to follow the first step of the *Van Arsdall* harm analysis procedure for *Crawford* error:

> Most of these [*Van Arsdall*] factors apply regardless of whether the constitutional error was in the admission or exclusion of evidence. But the initial "assumption" that the damaging potential of the cross-examination had been realized applies only when the trial court restricts cross-examination or excludes evidence. In those instances, the reviewing court must determine whether it is convinced, beyond a reasonable doubt, that the fact-finding process was reliable even if the improperly restricted or excluded evidence is factored into the analysis. But when the error involves the admission of evidence in violation of the Confrontation Clause, reviewing courts may not speculate as to whether cross-examination would have been effective or not, had it occurred. . . .
>
> We therefore take this opportunity to clarify that the *Van Arsdall* initial assumption ("that the damaging potential of the cross-examination were fully realized") applies to confrontation errors of exclusion, not confron-

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[9] The Texas Court of Criminal Appeals mandated the *Van Arsdall* harm analysis procedure for analyzing Confrontation Clause violations in Texas cases in *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991) ("As this case involves an error in violation of the Sixth Amendment, we must perform the analysis set out in *Van Arsdall*.")

tation errors of admission. On the other hand, most of the non-exclusive list of factors set out in *Van Arsdall* may well be applicable in analyzing whether constitutional error in the admission of evidence is harmless under a *Chapman* analysis.

Thus, courts reviewing whether the error in admitting out-of-court statements in violation of *Crawford* is harmless beyond a reasonable doubt should consider:

(1) The importance of the hearsay statements to the State's case;

(2) Whether the hearsay evidence was cumulative of other evidence;

(3) The presence or absence of evidence corroborating or contradicting the hearsay testimony on material points; and

(4) The overall strength of the prosecution's case.[10]

Of course courts may consider other factors as well, but, in the final analysis, the reviewing court must be convinced, beyond a reasonable doubt, that the admission of *Crawford*-barred testimony would probably not have had a significant impact on the mind of an average juror. Put another way, is there a reasonable possibility that the *Crawford* error, within the context of the entire trial, "moved the jury from a state of non-persuasion to one of persuasion" on a particular issue?

Davis v. State, 2006 Tex. Crim. App. LEXIS 1978, at *13-16, *19-20 (Tex. Crim. App. 2006).

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[10] The court noted that it was omitting factor four of the second step set out in *Van Arsdall* ("the extent of cross-examination otherwise permitted") because, in this type of case, no cross-examination has been allowed. In thus holding, the court assumed that the only cross-examination that this Court would find relevant to the assessment of harm from the Sixth Amendment violation was the forbidden cross-examination of the out-of-court declarant. Yet the ability to cross-examine other witnesses, such as individuals who witnessed the declarant making his statement, could conceivably be quite relevant to the question of how much the defendant was harmed by the failure to allow cross-examination of the declarant.

Thus, the Court of Criminal Appeals has explicitly taken the position that it will not contemplate the damaging effect that cross-examination would have had in performing its harm analysis when it views the error as one of admission, rather than exclusion, of evidence. The effect of skipping this first step of the *Van Arsdall* analysis here was that the court focused its attention only on the effect of Michael Scott's statement on the result of the trial, *without directly considering the impact of the very error complained of by Respondent*: the deprivation of the right to cross-examine Scott.

B. Calculating the Damaging Potential of the Denied Confrontation

The Court of Criminal Appeals' approach fails to analyze the effect of the error alleged by Respondent. After all, an out-of-court statement of an accomplice does not inherently violate the Sixth Amendment. Michael Scott's statement would have undeniably been admissible if he could have been produced for either direct or cross-examination. The statement would have been admissible on direct examination under state law as a statement against penal interest with corroborating circumstances, and also as impeachment, if appropriate. See *Crawford*, 541 U.S. at 59, n. 9 ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.") The real Confrontation Clause violation in *Crawford* cases is the deprivation of cross-examination of the declarant, not the admission of the out-of-court statement.

Petitioner understands that this type of Confrontation Clause error may be viewed also as an error of admission: if cross-examination is improperly limited, the trial court errs in admitting the testimony that was unable to be tested by cross-examination. Nevertheless, Petitioner submits that *Crawford*-type Confrontation Clause error is more accurately viewed as

an error of omission: the accused is wronged because cross-examination and impeachment were not allowed.[11]

The Court in *Van Arsdall* reasoned that when the procedural crucible of cross-examination has been denied, the appellate court should base its determination of harm according to the situation that would have existed had the evidence been tested properly by cross-examination. *Van Arsdall* thus offers the proposition that the accuracy of an appellate measurement of harm is directly related to the degree to which the damaging potential of cross-examination is discernable.

The court below held in *Davis*, *supra*, that, "when the error involves the admission of evidence in violation of the Confrontation Clause, reviewing courts may not speculate as to whether cross-examination would have been effective or not, had it occurred." However, it is not self-evident why reviewing courts should not be allowed to "speculate as to whether cross-examination would have been effective or not" under these circumstances, but are permitted to consider what cross-examination would have revealed in other cases where cross-examination has been restricted. The court below ignored evidence that unquestionably would have been admitted had the declarant testified. The Texas court saw a reverse image in the mirror and mistook it for realism.

Petitioner suggests that Confrontation Clause harm analysis should not depend on an appellate court's arbitrary designation of the Sixth Amendment violation as improper admission versus improper exclusion. Rather, the implementation of the first step of the *Van Arsdall* analysis by a reviewing court should instead turn on an analysis of the record in each

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[11] Compare *Harrington v. California*, 395 U.S. 250, 253 (U.S. 1969) (where two non-testifying codefendants' confessions were erroneously admitted, this Court analyzed the impact of "the lack of opportunity to cross-examine" the two codefendants, emphasized the overwhelming evidence against the defendant, and also noted that cross-examination of a third codefendant was allowed).

individual case. The reviewing court should ask whether the appellate record indicates the parameters under which cross-examination would have occurred, in a manner that allows the court to estimate the damaging potential of the denied confrontation. Where the record provides so much information that it is akin to an offer of proof regarding the denied cross-examination, the reviewing court has the ability to perform a thorough harm analysis without undue speculation.

For example, in *U.S. v. Stewart*, 93 F.3d 189 (5th Cir. 1996), the Fifth Circuit held that the district court's restriction of cross-examination was "so severe and so swift" that it violated his Confrontation Clause rights. *Id*, 93 F.3d at 194. Yet the Fifth Circuit estimated the "damaging potential" of the denied cross-examination by considering what cross-examination would have revealed. The Fifth Circuit relied on what it had before it—a proffer of questions that defense counsel would have asked had he been permitted. *Id.* In *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991), the Texas Court of Criminal Appeals discussed the "damaging potential" of the denied cross-examination in assessing the harm of the Sixth Amendment violation. The court assumed that the jury would have been fully informed about a pending lawsuit by the witness against the apartment complex (the topic about which cross-examination had been denied). *Id*, 819 S.W.2d at 550.[12]

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[12] Compare also *McClellan v. United States*, 706 A.2d 542, 548 (D.C. 1997). The trial court restricted cross-examination of a critical witness because the witness asserted the Fifth Amendment privilege. *Id.* Nevertheless, the reviewing court was able to draw conclusions about what cross-examination would have revealed because other evidence at trial disclosed the witness's hostility toward the defendant. The court held that, in light of the record, the defendant "was afforded extraordinarily complete and effective substantive means of showing bias." *Id*, 706 A.2d at 548.

These cases illustrate that an appellate court has the ability, where the record provides the necessary facts, to use available evidence to determine the parameters of what the denied cross-examination would have yielded.

C. What would the crucible of Respondent's cross-examination of Scott have revealed?

In the instant case, this Court has an extensive record revealing what the "damaging potential" of the cross-examination of Michael Scott would have revealed. Since Petitioner introduced a videotape of Respondent admitting that he fully participated in the Yogurt Shop rape/robbery/ murder, he invariably would have been in the position of attempting to show that Scott's admissions were coerced, as he also claimed regarding his own confession. The jury would have heard testimony of Michael Scott admitting that he raped one girl and shot two others in the head. If Respondent had been so unfortunate as to live out the charade he now plays, he would have been presented the opportunity to explain why Scott, unbeknownst to the jury, not only incriminated himself but also corroborated Respondent's involvement.

The trial court held a pretrial hearing in order to discuss the proposed admission of Michael Scott's redacted statement. (RR 42:4). The defense questioned at length the officers who met with Scott and took his statements, Detectives Manuel Fuentes, Ron Lara, and Robert Merrill, plus several other witnesses, and also offered exhibits. (See RR 42, 43). This hearing spanning two days of testimony fully developed defense claims that Scott's statement was not credible because it was coerced. Counsel explored the defensive theory that the police used the flawed technique of leaking information about the crime to the suspects. (See RR 43: 16).

The record of this hearing essentially serves as a 'bill of exception' exploring the same subject matter as cross-examination and impeachment would have, had Michael Scott taken the stand.

Counsel asked Detective Fuentes about the length of Scott's initial interrogation at the police station (allegedly 14 ½ hours), whether Scott was told that terminating the interview would be a crime, and whether Detective Merrill held a gun near Michael Scott's head to scare him during the interview (Lara remembered these events differently). (RR 42: 42-46; see also 102-103).[13] Counsel attacked the reliability of Scott's statements, pointing out that, since the detectives were not aware that Scott had been interviewed other officers in 1991, they could not be sure what facts Scott might have learned from other sources. (RR 42: 99). Counsel explored the fact that police had found no physical evidence confirming many of Scott's assertions. (RR 42: 99-100). Detective Lara then read aloud a section of Scott's interview in which he mentioned talking to an attorney. Scott asked the detectives what he should do. He then agreed to talk to the case agent (Detective Merrill) before making a decision about whether to talk to a lawyer.

When Detective Merrill took the stand he denied threatening Scott with a gun and explained that he poked Scott with his finger. (RR 42: 121; 43: 4-7). He also explained that, as soon as Scott asked about an attorney, he questioned Scott until he was satisfied that Scott did not want an attorney at that time and voluntarily desired to continue the interview. (RR 42:121-122). Despite the fact that the line of questioning involved speculation and hearsay, the trial court permitted the defense to question Detective Merrill about concededly false

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[13] Detective Lara's testimony demonstrated Michael Scott's willingness to cooperate with detectives and his apparent motivation to continue conversations and break through his mental barriers. For instance, Lara discussed Scott's conversation with attorney Betty Blackwell advising him to stop talking with police, and his invitation to the detectives to come to his house to discuss the murders. (RR 42: 74-76). At one point, Scott even offered to replace the detectives' faulty tape recorder batteries during the interview in his home. He removed the batteries from his own kitchen "bird clock" and gave them to the detectives. (RR 42: 77).

confessions from others obtained in 1991 and 1992. (RR 43: 17-24).

Counsel also questioned the investigators from 1991. He asked them about the proliferation of purportedly confidential information among teenagers in the area and the false confessions. (See, e.g., 97-106, 117, 135). Petitioner followed up with questions showing that many of the facts the teenagers were talking about were incorrect. Further, Petitioner discussed the motivations of the individuals who falsely confessed (e.g., Alex Briones wanted the reward money for his family and Shawn Smith wanted to receive the death penalty). (See RR 43: 127-131). The two men in Mexico were tortured by Mexican authorities. (RR 43: 173-174). The false confessions contained incorrect facts. (RR 43: 149-153, 165-168, 176-177).

In sum, the testimony and exhibits admitted at this hearing suggest the full range of damaging cross-examination that would have occurred had Michael Scott taken the stand, and set forth some of Petitioner's responses to this evidence.

This Court has before it excerpts from the transcriptions of twenty hours of Scott's conversations with police; his multiple admissions and retractions, finally arriving at acceptance of the horrible crime he had committed. (App. C). The complete transcriptions of these twenty hours were entered into evidence for purposes of the record. These discussions led him to reveal the truth to his tearful father, and to shun an attorney's advice to quit talking to police. The final result was his written confession (App. E) that was redacted and read into evidence. (App. D).

If not for Petitioner's reliance on *Ohio v. Roberts,* Respondent's best-case scenario would have played out in the following manner. Petitioner would have granted Scott use immunity after invocation of his right not to testify. After a hearsay objection, Petitioner would have shown that the redacted statement met the requirements of a declaration

against penal interest under Texas Rule of Evidence 803(24). Petitioner would have offered the redacted statement into evidence and then either would have asked questions or passed the witness. Next, Respondent would have had the opportunity to realize the goal he now claims he desired, which would necessarily have led to one or more of the following:

1. Scott would have testified that his redacted statement was true. Respondent would have tried to draw forth testimony supporting his rather ludicrous claim of coercion. The case then would have been in the posture it is now, minus, of course, the *Crawford* issue.

2. Scott would have retracted his admissions, claiming he was coerced during the week-long interview process.

3. If the second option occurred, Petitioner would then have impeached him with the twenty hours of taped conversations and with his full written confession (not merely the redacted version). See *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078, 85 L.Ed.2d 425 (1985) (holding that the state could introduce accomplice's entire statement, even though directly implicating defendant, for purpose of rebuttal, where defense theory was that defendant's confession was merely a coerced version of accomplice's confession).

Scott's full written confession (App. E) provides the definitive answer to Respondent's insinuation that he would have benefited from Michael Scott as a witness. The Court may, however, be interested in the recorded interviews in light of the defense claim that they were the fabricated and coerced product of improper suggestion by law enforcement. The excerpts (App. C) show that Scott's statements to police were not coerced and give insight into the tragic process of Scott coming to terms with his own involvement in this horrible crime.

If Scott had been a witness he would have been called upon to explain more fully matters to which he only briefly alluded in his conversations with police, such as 1) the circumstances surrounding his conversations with defense attorney Betty Blackwell and his rejection of her warning against talking to investigators, 2) the conversation in which he told his father that he was in serious trouble for something he had done seven years earlier, and that this brought his father to tears, 3) inviting the detectives inside his home one time and on other occasions walking half a mile to meet them at the highway near his home, 4) telling a detective that he thought the jacket he had worn during the murders was stored with other belongings in a rented storage room, 5) taking detectives on a hunt for the discarded .380 murder weapon, and, 6) guiding detectives in the search for the bridge on which the group stopped shortly after the murders.

By the time Petitioner would have finished confronting Scott with his prior statements and actions, his retraction would have amounted to nothing more than a whisper.

D. *Van Arsdall* Second Prong Factors

Michael Scott's redacted statement to police as admitted at trial was cumulative of other testimony. He had admitted his participation in this crime to witness Amanda Statham. (RR 53: 153). Scott even told Statham some details of the murders. (RR 53: 153). Statham's mother confirmed Statham's testimony. (RR 54: 119).[14]

Further, Scott's statement was not essential to the jury's verdict. Scott's redacted confession did not describe any action of Respondent and did not establish any element of the offense that Petitioner was required to prove. His statement did not even suggest the presence of an accomplice. And a

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[14] The Court of Criminal Appeals held the trial court did not err in admitting Statham's testimony because it was not "testimonial." See *Springsteen*, slip op. at *25-*27.

cursory glance at the redacted statement shows that many of the facts Scott discussed were corroborated by Respondent's confession and other evidence: reading a newspaper in the stolen Pathfinder on the way to San Antonio after the murders (corroborated by confession of Respondent and testimony of Meredith Skipper); propping open the back door prior to the robbery (corroborated by Respondent); going to the bathroom and leaving through the back door (corroborated by Respondent, Dearl Croft, Maria Thomas); silver .38-caliber automatic weapon used (corroborated by Respondent, Chandra Morgan, shell casing and bullet found at the scene); Scott raped a girl (corroborated by Respondent); Scott shot one girl in the back of the head with the .22 (corroborated by Respondent, body of Amy Ayers); position in which Amy Ayers died (corroborated by position of Amy Ayers' body found at crime scene); five shots fired (corroborated by Respondent, bullets recovered from bodies); left the yogurt shop and threw up on the bridge (corroborated by Respondent).

Petitioner's evidence in this case was compelling even without Scott's confession. Presiding Judge Keller provided a succinct summary of Petitioner's evidence in her dissenting opinion:

> In summary, appellant confessed. That confession was voluntary. Appellant had no motive to confess falsely, and there was absolutely no reason for the jury to doubt the truthfulness of the confession. Appellant knew that a .380 semi-automatic handgun was used in the murders, and this information was a closely guarded secret known only to law enforcement and the perpetrators. His various explanations for how he knew that a .380 was used were inconsistent and unbelievable, and he even contradicted himself on the question of whether he had ever owned guns at all. Appellant had previously been seen in possession of a .380 semi-automatic handgun, and on the very day of the murders he was seen in

> possession of a semi-automatic handgun. Appellant's alibi testimony was unsupported by other testimony or physical evidence of any kind. It was contradicted by his own videotaped confession, by Chandra Morgan's testimony, and by Scott's admission to the murders. Not only are Morgan's testimony and Scott's confession inconsistent with appellant's alibi, they are consistent with details of appellant's videotaped confession. The two "alternate suspects" who confessed to involvement in the crime—Briones and Smith—were unaware that a .380 handgun was used, and they implicated "accomplices" who clearly were not involved. Any error in admitting Scott's written confession was harmless beyond a reasonable doubt.

Springsteen, slip op. at *64-*65 (Keller, P.J., dissenting, at App. I).

While not in the above excerpt, Respondent admitted in his videotaped statement that he shot one of the girls in the back of the head with a .380 handgun as she was crawling away, and illustrated with his arms and body the position in which she was later found.

Finally, as noted above, although Respondent did not cross-examine Michael Scott, he was allowed to cross-examine the detectives involved in Scott's interrogation and other witnesses, concerning the defense claims that Scott's statement was coerced and unreliable.

CONCLUSION

The present case differs from other *Crawford* cases because here it is clear from the appellate record what Respondent's "crucible of cross-examination" would have revealed. Respondent's attorneys were able to thoroughly pursue the defense claims about Scott's interrogation and police investigation methods. It is clear that Petitioner would have successfully countered any attempt by Scott at retraction. Petitioner submits that it is simply not possible to listen to the

twenty hours of recorded conversations and read Scott's full written confession without concluding that Michael Scott's admissions were truthful. And Scott would have had to explain why he implicated Respondent. True, such statements might have come in as impeachment. Nevertheless, the net effect of full examination of Scott would have been to destroy his credibility as a witness who could help the defense.

Analysis of the second prong factors, taking into consideration the record's clear showing of what cross-examination of Scott would have produced, shows that Scott's redacted statement to police was not critical to Petitioner's case. It did not establish any of the elements of the offense and was cumulative of and corroborated by other evidence, including Scott's admissions to Statham. Moreover, the other evidence in the trial, including Respondent's own compelling confession and Respondent's knowledge of facts known only to himself and the police, indicate that the admission of the redacted statement without cross-examination did not prejudice the result of this trial.

Petitioner asks that the Court reverse the decision of the Texas Court of Criminal Appeals, and hold that Michael Scott's solely self-incriminating statements were not testimonial within the meaning of *Crawford v. Washington* and progeny. Alternatively, Petitioner asks that the Court remand the case to the court below so that it may conduct a thorough harm analysis, giving full consideration to *Van Arsdall's* requirement that the reviewing court first assume that the damaging potential of cross-examination had been fully realized.

Respectfully submitted,

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